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Death Penalty Struck Down In Bay Spy Case

By William Cooney

The U.S. Court of Appeals, acting in a Silicon Valley spy case, ruled yesterday that the death penalty provision of the Espionage Act is unconstitutional.

The court in San Francisco reversed U.S. District Judge Samuel Conti's ruling late last year that James Durward Harper Jr. could face the death penalty if convicted of selling national defense secrets to Polish spies.

The capital punishment provision is unconstitutional because it lacks guidelines governing when the penalty should be imposed, the court said.

Harper, 49, a former consulting engineer, is scheduled to go on trial April 24 on charges that he sold 58 documents dealing with the U.S. ability to survive a nuclear attack to a Polish spy between May 1979 and last October 15, when he was arrested by FBI agents in Mountain View.

His attorney, Jerrold M. Ladar, said yesterday's ruling opens the possibility of a plea bargain.

Knocking down the death penalty, he said, "makes trial preparation, and the possibility of a disposition without a trial, more of a reality we can work with."

Ladar said Harper's reaction was, "It feels like someone freed me."

Harper is being held in an undisclosed prison.

He said after his arrest that he would cooperate fully with the government, and he reportedly talked freely to FBI agents and prosecutors for two months before hiring Ladar.

Both the prosecution and Ladar maintained that the death penalty for espionage had been ruled unconstitutional by the U.S. Supreme Court, so the maximum possible penalty for Harper would be life in prison.

But Conti in mid-December ruled that he had the power to establish and apply the required guidelines, and that Harper could face death. Ladar immediately appealed.

Conti said at a hearing after yesterday's ruling that he disagrees with it but is bound by it. He noted that his view was not argued before the appellate court because the prosecution sided with Ladar.

One courthouse observer commented wryly that the appellate court ruling "extends to Northern California the same federal law that applies in the other 49½ states."

The Court of Appeals opinion was written by Justice Stephen Reinhardt and joined by Justices Joseph T. Sneed and Betty Fletcher.

In comments not directly related to the constitutional issue, the opinion said the death penalty may work against national security interests.

A judge may be reluctant to accept any plea bargain in a capital case, forcing a full trial in which the prosecution may feel compelled to reveal more sensitive security information than it normally would, the court noted.

"The government may be compelled to disclose information that jeopardizes intelligence sources or even compromises the national security," the court said.

"The interest of the government — and of the public — in disposing of such cases without trial is particularly strong."